

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TOMAHAWK MANUFACTURING, INC.,
and FORMTEC, LLC,

Plaintiffs,

SPHERICAL INDUSTRIES, INC.,
SPHERICAL INDUSTRIES HOLDINGS
LLC, CHRISTOPHER MICHAEL
DUGGAN, and WILL STEVEN HARDY,

Defendants

Case No.: 2:23-cv-01007-APG-NJK

Order Granting Motion to Dismiss Count Two of the Complaint

[ECF No. 85]

10 The defendants move to dismiss count two of the plaintiffs' complaint, arguing that the
11 common law claim for conspiracy to misappropriate trade secrets is displaced by Nevada's
12 Uniform Trade Secrets Act (NUTSA). The plaintiffs respond that the complaint alleges the
13 defendants misappropriated both trade secrets and confidential information, so the conspiracy
14 claim in count two is not displaced because it does not depend on misappropriation of a trade
15 secret. The plaintiffs also contend that the claim should not be dismissed because they can plead
16 in the alternative. Finally, the plaintiffs argue that if I dismiss count two, I should grant leave to
17 amend so the complaint can better distinguish between trade secrets and confidential
18 information.

19 NUTSA “displaces conflicting tort, restitutionary, and other law of this state providing
20 civil remedies for misappropriation of a trade secret.” Nev. Rev. Stat. § 600A.090(1). “A tort
21 claim conflicts with NUTSA if its proof depends on the defendant misappropriating a trade
22 secret. In other words, if a plaintiff must prove misappropriation of a trade secret to succeed on
23 its tort claim, that tort claim is barred.” *Octaform Sys. Inc. v. Johnston*, No. 2:16-cv-02500-APG-

1 VCF, 2017 WL 2562110, at *4 (D. Nev. June 12, 2017) (footnote omitted). Consequently, a
 2 plaintiff cannot pursue a common law tort claim arising from a “single factual episode” of
 3 misappropriation of a trade secret. *Frantz v. Johnson*, 999 P.2d 351, 357-58 (Nev. 2000).

4 However, NUTSA does not displace “all claims that arise from a factual circumstance
 5 possibly involving a trade secret.” *Id.* at 357 n.3. NUTSA does not displace contractual remedies
 6 or criminal sanctions even if based on misappropriation of a trade secret. Nev. Rev. Stat.
 7 §§ 600A.090(2)(a), (c). NUTSA also does not displace “[o]ther civil remedies that are not based
 8 upon misappropriation of a trade secret.” *Id.* § 600A.090(2)(b). Thus, if the plaintiff pleads
 9 claims that “do not depend on the information at issue being deemed a trade secret,” NUTSA
 10 does not displace those claims. *Frantz*, 999 P.2d at 357 n.3.

11 Count two alleges that the defendants knew that certain information¹ constituted “trade
 12 secrets,” the defendants owed a duty to the plaintiffs’ not to disclose the “trade secrets,” and the
 13 defendants misappropriated the plaintiffs’ “trade secrets” with the intent to use those secrets to
 14 make their own product and file their own patent applications. ECF Nos. 1 at 28-29; 9 at 28-29.
 15 Nothing in count two references misappropriation of confidential information that is not alleged
 16 to be a trade secret. Although count two incorporates the complaint’s other allegations, count
 17 two specifically describes the misappropriated material as a trade secret, not confidential
 18 information. Thus, count two, as currently pleaded, is displaced by NUTSA because it depends
 19 on the misappropriation of a trade secret.

20 The plaintiffs argue that they can plead count two in the alternative to the NUTSA claim.
 21 Under Federal Rule of Civil Procedure 8(d)(2), “[a] party may set out 2 or more statements of a
 22

23 ¹ The plaintiffs identify the trade secret in the sealed version of the complaint. ECF No. 9 at 28-29.

1 claim or defense alternatively or hypothetically, either in a single count or defense or in separate
2 ones.” However, the plaintiffs did not plead the claim in a way that could be alternative to
3 NUTSA. The plaintiffs pleaded that the identified information was a trade secret and that the
4 defendants misappropriated that trade secret. Additionally, the complaint does not give the
5 defendants fair notice as to what constitutes confidential information that is not a trade secret.
6 *See Echlin v. PeaceHealth*, 887 F.3d 967, 977 (9th Cir. 2018) (“Federal Rule of Civil Procedure
7 8(a)(2) requires that the allegations in the complaint give the defendant fair notice of what the
8 plaintiff’s claim is and the grounds upon which it rests.” (quotation omitted)). Consequently, I
9 grant the defendants’ motion to dismiss count two.

10 I grant the plaintiffs leave to amend this claim because it is not clear that amendment
11 would be futile. *Sonoma Cnty. Ass’n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1118
12 (9th Cir. 2013) (“As a general rule, dismissal without leave to amend is improper unless it is
13 clear that the complaint could not be saved by any amendment.” (simplified)). If the plaintiffs
14 want to amend this claim, they may wait for me to rule on the pending motion to amend at ECF
15 Nos. 159/160 before doing so. Alternatively, if the plaintiffs want to withdraw the pending
16 motion to amend and file a new motion to amend in light of this order, they also have leave to do
17 that. If the plaintiffs withdraw the pending motion and file a new one, responses are due by
18 March 25, 2024 or the usual time to respond to a motion under the Local Rules, whichever is
19 later.

20 I THEREFORE ORDER that the defendants’ motion to dismiss (**ECF No. 85**) is
21 **GRANTED**, with leave to amend as set forth in this order.

22 DATED THIS 22nd day of February, 2024.



23
Andrew P. Gordon
UNITED STATES DISTRICT JUDGE